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In the Supreme Court of the United States

OCTOBER TERM, 1991

BARBARA FRANKLIN, SECRETARY OF COMMERCE, ET AL.,
APPELLANTS

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE APPELLANTS

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QUESTIONS PRESENTED

The three-judge district court held that the Census Clause of the Constitution (Art. I, § 2, Cl. 3) and the Census Act (13 U.S.C. 141) permit the Secretary of Commerce to include federal personnel stationed abroad (and their dependents) in the state population totals on which the apportionment of Representatives is based. However, the court held that the Secretary's manner of doing so following the 1990 census was arbitrary and capricious, in violation of the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A), because, in the court's view, he did not furnish an adequate justification. The questions presented are:

1. Whether judicial review of the apportionment of Representatives, and the underlying census counts including federal personnel stationed abroad, is barred by virtue of the APA's exceptions for situations in which "statutes preclude judicial review" and "agency action is committed to agency discretion by law," 5 U.S.C. 701(a), and the inapplicability of the APA to the President.

2. Whether, if judicial review is not barred, the Secretary's report of State population totals and the apportionment of Representatives was arbitrary and capricious because of the inclusion of federal personnel stationed abroad.

3. Whether, if the district court correctly found a violation of the APA, it properly ordered appellants to effect a new apportionment of Representatives with the personnel abroad thrown out of the underlying census count, rather than remanding the matter to the Secretary for further proceedings.

PARTIES TO THE PROCEEDINGS

The appellants herein, who were defendants in the district court, are Barbara Franklin, Secretary of Commerce (substituted as a party pursuant to Rule 35.3 of this Court); Mark W. Plant, Acting Under Secretary of Commerce for Economic Affairs (also substituted pursuant to Rule 35.3); the Bureau of the Census; Barbara Bryant, Director of the Bureau of the Census; and George Herbert Walker Bush, the President of the United States. Donnald K. Anderson, the Clerk of the United States House of Representatives, also was a defendant in the district court.

The appellees in this Court, who were the plaintiffs below, are the Commonwealth of Massachusetts and two of its registered voters, Edward F. Berlin and Karen J. Kepler.

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BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 1a-84a) and its order denying reconsideration and a stay (J.S. App. 85a-93a) are not yet reported.

JURISDICTION

The judgment of the three-judge district court (J.S. App. 94a-96a) was entered on February 20, 1992, and the notice of appeal (J.S. App. 97a-98a) was filed on March 16, 1992. Probable jurisdiction was noted on March 20, 1992. J.A. 244. The jurisdiction of this Court is invoked under 28 U.S.C. 1253. See J.S. 16 n.7.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2, Clause 3 and Section 8, Clause 18 of Article I of the United States Constitution; Sections 2 and 5 of the Fourteenth Amendment; 2 U.S.C. 2a; 5 U.S.C. 701(a) and 706; and 13 U.S.C. 141(a) and (b), are reproduced at App., *infra*, 1a-6a.

STATEMENT

The Commonwealth of Massachusetts and two of its registered voters brought this suit to challenge the decision by the Secretary of Commerce to include in the 1990 census count for each State those federal personnel stationed abroad who designated that State as their permanent "home of record" when they entered the Armed Forces, or who were found to have a sufficient nexus to that State under an alternative standard. The court rejected appellees' contentions that inclusion of federal personnel abroad (and their dependents) in the enumeration on which the apportionment of Representatives is based violates the Constitution (Art. I, § 2, Cl. 3; Amend. XIV, § 2) and the Census Act (13 U.S.C. 141). However, concluding that the conduct of the census is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, the court held that the particular *manner* of including personnel abroad was arbitrary and capricious, because, in its view, the Secretary of Commerce did not furnish an adequate explanation or factual justification for the method of allocation. Rather than remanding the matter to the Secretary, however, the court ordered appellants to effect a new apportionment of the House of Representatives, with the personnel abroad *excluded*. Under the district court's order, a total of 919,810 people must be eliminated from the apportionment counts for the States. Stipulation of Facts (Stip.) ¶ 53 (J.A. 185).

1. Article I, Section 2, Clause 3 of the Constitution provides that "Representatives * * * shall be apportioned among the several States * * * according to their respective Numbers." It further provides that "[t]he actual Enumeration shall be made * * * in such Manner as they [the Congress] shall by Law direct." Pursuant to the latter provision, Congress has directed the Secretary of Commerce to conduct a census, as of April 1, 1980 and every tenth year thereafter, "in such form and content as he may determine." 13 U.S.C. 141(a). The Census Act further provides that "[t]he tabulation of total population by States * * * as required for the apportionment of

Representatives in Congress among the several States shall be completed within nine months after the census date and reported by the Secretary to the President of the United States." 13 U.S.C. 141(b).

Under the Apportionment Act, the President then must transmit to Congress, during the first week of its next session, "a statement showing the whole number of persons in each State" (as ascertained under the decennial census just completed) "and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions." 2 U.S.C. 2a(a). Within 15 calendar days after receipt of the President's statement, the Clerk of the House of Representatives must send to the Governor of each State "a certificate of the number of Representatives to which such State is entitled under this section." 2 U.S.C. 2a(b).

Following the 1990 decennial census, the Secretary of Commerce submitted his report to the President on December 26, 1990; the President transmitted his statement to Congress on January 3, 1991; and the Clerk of the House sent his certificates to the Governors on January 16, 1991. The Clerk certified that Massachusetts is entitled to ten Representatives, a loss of one from the 1980 apportionment. J.S. App. 2a n.1.

2. The concept of "usual residence" has been the guiding principle in formulating rules for enumeration (who should be counted) and residence (where they should be counted) since the first census in 1790. It provides that persons generally should be included in the census counts at the place where they live and sleep most of the time as of the census date. Stip. ¶¶ 4, 5 (J.A. 173-174). At the same time, the first Census Act recognized that persons "occasionally absent at the time of the enumeration" from their usual residence in the United States should nevertheless be returned "as belonging to that place," rather than their actual physical location on the census date. Act of Mar. 1, 1790, ch. 2, § 5, 1 Stat. 103 (quoted

at J.S. App. 59a); see page 35, *infra*. From the earliest censuses, officials have developed rules for determining where people "belong" for purposes of the census when they are temporarily away from what might be considered a usual residence on census day. See, *e.g.*, Bureau of the Census, *200 Years of Census Taking* 22 (1989) (1850 instruction specifying that "[a]nyone who is temporarily absent on a journey, or for other purposes, without taking up his place of residence elsewhere, and with the intention of returning again, is to be considered a member of the family which the assistant marshal is enumerating"). In particular, the Census Bureau from time to time has developed rules for applying, modifying, or departing from the "usual residence" principle for certain classes of individuals, including, for example, college and boarding school students, seafarers, Members of Congress, and—of direct pertinence here—federal military and civilian personnel serving abroad, as well as other Americans abroad.[1]

[1] See J.S. App. 60a-62a n.24; Stip. ¶ 23 (J.A. 178) (boarding school students counted at parents' home, even if living and sleeping at school); Stip. ¶ 22 (J.A. 178) (college students counted at parents' home 1900-1940, at college 1950 and after); Stip. ¶ 10 (J.A. 175) (1900 instructions to count family members serving in military at family home, even if living and sleeping abroad); Stip. ¶ 28 (J.A. 179-180) (military personnel serving abroad allocated to home of record in United States in 1970); J.A. 107 (Members of Congress may be counted at home district, even if living and sleeping most of the time in District of Columbia vicinity); J.S. App. 61a n.24; J.A. 220-222 (crew of merchant vessel traditionally counted at port where ship is berthed, at port of destination if in U.S. territory, or at home port if vessel is in territorial waters but headed overseas); J.A. 222 (crew of canneries, freezer ships, and tuna ships may claim a usual residence on shore, even though at sea for several months); C.D. Wright and W.C. Hunt, *History and Growth of the Census: 1790-1890*, at 157, 171, 186 (1900) (1870, 1880 and 1890 instructions providing that "seafaring men are to be reported at their land home, no matter how long they may have been absent, if they are supposed to be alive"); Dep't of the Interior, Census Office, *Instructions to Enumerators for Twelfth Census* ¶ 112 (1900) (same); Dep't of Commerce & Labor, Bureau of the Census, *Instructions to Enumerators for Thirteenth Decennial Census* ¶ 62 (1910) (same); *id.* ¶ 64 (U.S. citizen abroad who is member of family in district should be enumerated as of district; "[i]t does not matter how long the absence abroad is continued, provided the person intends to return to the United States"); U.S. Dep't of Commerce, Bureau of the Census, *Instructions to Enumerators for Fourteenth Decennial Census* ¶¶ 61, 63 (1919) (same for seafarers and citizens abroad); U.S. Dep't of Commerce, Bureau of the Census, *Instructions to Enumerators for Fifteenth Census* ¶ 78 (1930) (same for citizens abroad); U.S. Dep't of Commerce, Bureau of the Census, *Instructions to Enumerators for Sixteenth Decennial Census* ¶ 330 (1940) (same).

Military personnel serving outside the States were first included in the Nation's total population in 1830 and 1840, although their numbers were not allocated to particular States for purposes of apportionment of Representatives. The counting was then discontinued, but was reinstated in 1900, when significant numbers of servicemen were abroad as a result of the Spanish-American War. See 41 Op. Att'y Gen. 31, 34 (1949). Although the count of servicemen stationed abroad was not allocated to particular States, instructions to enumerators for use in the United States in 1900 specified that "[i]f a soldier, sailor, or marine (officer or enlisted man), or civilian employee in the service of the United States at a station at home *or abroad*, is a member of a family living in your district, he should be enumerated as a member of that family, even though he may be absent on duty at the time of the enumeration." Stip. ¶ 10 (J.A. 175) (emphasis added). From 1910 through 1960, military personnel serving abroad were included in the Nation's population, but that count was not allocated to particular States. Stip. ¶ 18 (J.A. 177).

In the 1970 census, the Department of Commerce decided to include overseas military personnel in state population totals for apportionment purposes, primarily using "home of record" data furnished by the Department of Defense. *Borough of Bethel Park* v. *Stans*, 449 F.2d 575, 581 (3d Cir. 1971). A person designates a "home of record" when enlisting in one of the military services, See DD Form 1966, Box . Instructions for completing the enlistment form state that the "home of record" is the

address "declared by you to be your permanent home or actual home at time of enlistment," and not a "temporary address."[2] "Home of record" "reflect[s] the State to which [an enlistee] will be moved upon separation."[3]

The Commerce Department decided to include overseas military personnel (and their dependents) in state totals in 1970 because of the large number serving abroad during the Vietnam conflict and strong bipartisan congressional support for doing so, *1976 Hearing* 7-9 (A.R. 41-43). The Commerce Department also relied on a 1969 opinion by then-Assistant Attorney General Rehnquist, who concluded that "the Director of the Census may, in his discretion, validly adopt that procedure." A.R. 14-15 (J.A. 46-47). Assistant Attorney General Rehnquist stated his understanding that the factors that led to the Director's former practice—namely, difficulties in securing reliable information and the substantial expense of allocation—had become "largely inapplicable," and that "it has become entirely feasible to make the proposed allocation to home States." A.R. 15 (J.A. 47). He also found it "reasonable to assume that many, if not most, persons of voting age living abroad vote in their home States and consider themselves to be represented in Congress by members from their home States." *Ibid.* As a result of including federal personnel stationed abroad (and their dependents), Oklahoma was apportioned one more Representative and Connecticut one less than each otherwise would have received. Stip. ¶ 28 (J.A. 179).

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[2] DD Form 1966 and the accompanying instruction were appended as Exhibit 3 to appellants' motion for reconsideration in the district court.

[3] Congressional Research Service, *The 1990 Census: Including Foreign-Based Military and Civilian Personnel in the State Counts* 4 (June 20, 1990) [quoting Defense Management Data Center procedures) (Administrative Record (A.R.) 878 (J.A. 149)). Some civilian employees were counted in 1970 as well. See generally *Census—Place of Residence: Hearing Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 94th Cong., 2d Sess. 8-9 & n.1 (1976) (statement of Robert L. Hagan, Deputy Director, Bureau of the Census) (reproduced at A.R. 42-43 (J.A. 57-59)) [hereinafter *1976 Hearings*].

In the 1980 census, the Commerce Department again counted military personnel abroad and included them in the total population of the Nation. It did not, however, include them in the tabulation of state populations for apportionment purposes, because of the smaller size of the overseas population, the practice prior to 1970 of not allocating the overseas personnel count among the States, "extra costs and complexities," the "minimal (if any) impact" on apportionment, and concerns that "[t]he data on 'home State' of those overseas are of an unknown reliability," because of the Census Bureau's belief at the time that some members of the Armed Forces may select as a "home State" one with low or no income taxes, rather than a "true" home State (but see note 28, *infra*). *1976 Hearing* 9 (A.R. 43; J.A. 61-62).

3. The Commerce Department likewise did not originally plan to include federal military and civilian personnel stationed abroad (and their dependents) in the state apportionment counts following the 1990 census. However, as with the 1970 census, there was strong bipartisan support in Congress for doing so; indeed, a number of bills had been introduced to mandate that result. Stip. ¶¶ 33, 37 (J.A. 180-182). One such bill was H.R. 4720, 100th Cong., 2d Sess., which specified that the place of residence for census purposes "shall be considered to be the individual's last place of general abode within the United States for a period of 6 consecutive months or longer." A.R. 363-364. The bill was reported favorably by the House Committee, which expressed the view that "[e]xcluding them from the State population totals denies these individuals who are serving their Government the right to full and fair representation in Congress." H.R. Rep. No. 953, 100th Cong., 2d Sess. 4 (1988) (A.R. 416). The House, however, voted not to suspend the rules to permit passage. Stip. ¶ 33 (J.A. 181). The floor debates showed a broad consensus in favor of including overseas personnel in the apportionment counts; the debates centered on the manner in which they would be allocated among the States. See 134 Cong. Rec. 25,798-25,804

(1988). Some Members expressed the view that the home State should be based on an individual's "home of record," rather than his last abode of six months, *id.* at 25,799-25,800 (Reps. Ridge and Goodling), noting that the latter test "would drastically skew the census toward those few States with a large number of military bases." *Id.* at 25,801 (Rep. Kennelly); see also *id.* at 25,803 (Rep. Green); *id.* at 25,804 (Rep. Petri).

On July 31, 1989, the Secretary of Commerce decided to count personnel abroad for apportionment purposes in 1990. A.R. 511-512 (J.A. 120-122). The Secretary noted that the Defense Department "believes strongly that its employees should not be excluded from the apportionment counts because of temporary and involuntary residence overseas," and that "[m]any, if not most, of these military overseas consider themselves to be usual residents of the United States, even though they are temporarily assigned overseas." A.R. 511 (J.A. 120). He also relied on the growing bipartisan concern of Congress; the Defense Department's assurance that it was feasible to provide the necessary data in time to meet the December 31, 1990 deadline for reporting to the President; the precedent of including overseas military personnel in 1970; and Assistant Attorney General Rehnquist's 1969 opinion that the Department enjoyed the discretion to do so. A.R. 511-512 (J.A. 120-122).

4. At the time the Secretary decided to include overseas personnel, the Commerce Department planned to use data derived from an enumeration of overseas personnel that the Defense Department had previously decided to conduct. Due to a lack of funding and other constraints, however, the Defense Department abandoned that option in December 1989. Stip. ¶ 46 (J.A. 184; A.R. 787). Attention then turned to alternative approaches based on existing Defense Department data.

At the same time, congressional support for use of "home of record" data intensified. For example, in a letter dated April 5, 1990, four Members of Congress urged the Director of the Census Bureau to adopt the "home of record" method (A.R. 811-812 (J.A. 129)):

> The only administrative listing which would best describe the residence of our members of the armed forces stationed abroad is the home of record. After all, the state listed for the home of record is the last location at which the members of the armed forces *CHOSE* TO RESIDE. In a very real sense, those states had this population taken from them by federal action.

On May 23, 1990, two bills were introduced to require the Census Bureau to assign members of the military stationed abroad to home States using their "homes of record." H.R. 4903 and S. 2675, 101st Cong., 2d Sess. The House Report on the former expressed the view that members of the Armed Forces and their dependents stationed overseas "are entitled to representation in Congress and should be included in the population figures used for apportionment of the House of Representatives," and recommended counting them on the basis of their homes of record because that information "most closely approximates the home State of individuals who are highly mobile, not by choice, but by virtue of their service to their country." H.R. Rep. No. 552, 101st Cong., 2d Sess. 3 (1990). The House passed H.R. 4903 on June 26, 1990. 136 Cong. Rec. H4195-H4197 (daily ed.). The companion Senate bill was scheduled for committee consideration in the near future. A.R. 862, 863, 919.

In this context, the Census Bureau reviewed the three methods for allocating overseas military personnel among the States based on data in existing Defense Department records: home of record, legal residence, and last duty station in the United States. A.R. 921 (J.A. 162).[4]

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[4] For a time after the Defense Department cancelled its enumeration, it believed that it could furnish to the Census Bureau information on service members' last residence of six months in the United States, although the Census Bureau expressed its willingness to utilize "home of record" data instead if the Defense Department reexamined available evidence and furnished an acceptable methodology by October 31, 1990. A.R. 745 (J.A. 137). The Defense Department subsequently determined that it did not have the capac-

After doing so, the Associate Director of the Bureau in charge of the Decennial Census recommended use of home of record, because in view of all the currently available information, "the technical staff of the Census Bureau believes that the Home of Record comes closest to the concept of the Usual Residence among the three data sources that DoD has available." A.R. 924 (J.A. 164).

The Under Secretary agreed with the Census Bureau and recommended that the Secretary adopt the "home of record" method, A.R. 919 (J.A. 158), concluding that home of record data "will constitute the most accurate data available from the Department of Defense." A.R. 919 (J.A. 158). By contrast, the Under Secretary explained that "because last duty station merely reflects the location of the facility to which a person is assigned, many military personnel and their dependents would be counted in states other than their actual previous U.S. residence (such as those assigned to the Pentagon, who would be counted as D.C. residents even though they lived in Maryland or Virginia)." A.R. 921 (J.A. 162). The Under Secretary also explained that the option of using a service member's legal residence was rejected because in many cases legal residence—which is declared by a member of the Armed Forces for tax purposes (*CRS Study* 4 (A.R. 878; J.A. 149))—does not necessarily reflect a substantial nexus to the State. A.R. 921 (J.A. 163); see also A.R. 932 (J.A. 168).

The Under Secretary communicated the Department's reasoning in letters to Members of Congress on July 23 and September 11, 1990. A.R. 925-942 (J.A. 165-169). He also noted that although approximately 7% of overseas personnel records lacked a home of record designation, the Defense Manpower Data Center planned to "use supplemental data from their automated records" to fill the gap and that, as a result, "the number of missing

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ity to assemble data on the last residence of its personnel in the United States of six months' duration. A.R. 919 (J.A. 158).

state designations will be negligible." See A.R. 931 (J.A. 167).[5]

5. On May 1, 1991, appellees filed this suit in an effort to retain Massachusetts' eleventh Representative. They challenged, *inter alia*, the inclusion of federal personnel stationed abroad in the population totals used for apportioning Representatives among the States.[6]

a. The district court rejected appellees' contention that because Section 2 of the Fourteenth Amendment refers to a counting of persons "in each State," inclusion of federal personnel stationed abroad violates the Constitution. J.S. App. 79a-81a. The court explained that the "in each State" language refers to "actual inhabitants of a state, that is, persons with some relation to the state—not simply those physically present in the state on census day," and it found "no indication that the members of the Constitutional Convention had in mind any specific criteria by which persons were to be deemed residents of one state rather than another." J.S. App. 80a (quoting *Borough of Bethel Park* v. *Stans*, 319 F. Supp. 971, 974 (W.D. Pa. 1970)). The court pointed out that in addition to military personnel, other subclasses of per-

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[5] Under the approach ultimately adopted, if the Defense Department did not have a home of record for a member, his home State (and that of his dependents) was determined on the basis of his legal residence, with last duty station being used if legal residence also was not available. Stip. ¶ 56 (J.A. 186). The home States of Defense Department civilian employees (and their dependents) were determined through a combination of administrative records and responses to a short questionnaire. A.R. 944 (J.A. 171). The home States of overseas employees of other federal agencies (and their dependents) were based on the agencies' responses, drawn from data in their records, on a form provided by the Census Bureau. Stip. ¶ 57 (J.A. 187).

[6] Appellees also challenged the equal proportions method prescribed by 2 U.S.C. 2a for apportioning Representatives among the States. The district court rejected that challenge. J.S. App. 27a-56a. On March 30, 1992, appellees filed a jurisdictional statement to docket a cross-appeal from that portion of the judgment below. The Court has since sustained the constitutionality of 2 U.S.C. 2a. *United States Dep't of Commerce* v. *Montana*, No. 91-860 (Mar. 31, 1992).

sons (such as boarding school and college students, other Americans abroad, and crew members of vessels at sea) also present the problem of how to account for people who are away from what might be considered their domicile or legal residence on the census date. The court noted that "[c]ensus administrators have developed various methods for dealing with the[se] subclasses"—methods that "have reflected contemporary societal views about what location should be designated as the 'usual residence' for such a person and the administrative practicability and accuracy of making a count of a member of the subclass at a particular location." J.S. App. 61a n.24. In the court's view, this "flexibility of the 'usual residence' concept as applied by the Census Bureau over the years * * * demonstrates the broad discretion the Bureau has traditionally enjoyed to interpret what the phrase 'in each state' means." *Id.* at 81a.

b. The court likewise rejected appellees' contention that inclusion of federal personnel stationed abroad in state population totals violates the Census Act. J.S. App. 81a n.31. It noted that 13 U.S.C. 141(a) "gives the Secretary broad discretion to determine how the census will be carried out, discretion which mirrors the broad mandate given to Congress" by Article I, Section 2, Clause 3. J.S. App. 81a n.31. Here, the court concluded, "[t]he policy decision to apportion overseas federal employees is well within the discretion afforded the Census Bureau under the Census Act." *Ibid.*

c. Invoking the APA, however, the district court invalidated the Secretary's determination to include federal personnel abroad in the 1990 apportionment counts. As a threshold matter, the court rejected appellants' position that the Secretary's determination to count overseas personnel on the basis of their homes of record and comparable data is not subject to judicial review under the APA because that matter is "committed to agency discretion by law." 5 U.S.C. 701(a)(2). It recognized that 13 U.S.C. 141(a), by providing for the Secretary to conduct the census "in such form and content as he may determine,"

"is plainly drawn in discretionary terms" and "'fairly exudes deference.'" J.S. App. 70a (quoting *Webster* v. *Doe*, 486 U.S. 592, 600 (1988)). But, observing that the census "can be profoundly influential in the balance of advantage among competing partisan and parochial interests," the court found it "especially appropriate to have some review by the courts, as the disinterested branch of government." J.S. App. 71a. The court believed that the "usual residence" policy furnished adequate standards for judicial review here. *Id.* at 70a, 71a.

Reaching the merits, the court condemned the Secretary's manner of including federal personnel abroad as arbitrary and capricious. J.S. App. 75a-79a. The court surmised that the Secretary decided in July 1989 to include overseas personnel only because the Defense Department planned to conduct a special enumeration that was expected to generate reliable data. The court stated that if the Secretary's decisionmaking were complete at that time, it "would not be prepared to say that his decision was arbitrary and capricious." *Id.* at 76a. But the court faulted the Census Bureau for proceeding to include federal personnel abroad after the Defense Department cancelled its plans for the enumeration. *Id.* at 76a-79a.

d. Rather than remanding the matter to the Secretary for further proceedings, the court ordered the Executive Branch defendants, by March 31, 1992, to submit to the Clerk of the House of Representatives a statement showing the number of Representatives to which each State would be entitled without inclusion of personnel abroad in the state apportionment counts. The court further ordered the Clerk of the House of Representatives, by April 10, 1992, to send to the Governor of each State a recertification of the number of Representatives to which it is entitled under the district court's decision. J.S. App. 95a. The district court's judgment, if allowed to stand, will result in the loss of one Representative by the State of Washington and a gain of one by Massachusetts. Stip. ¶ 42 (J.A. 183). On March 27, 1992, this Court granted a stay of the district court's judgment pending disposition of this appeal.

SUMMARY OF ARGUMENT

I. The apportionment of Representatives, and the underlying census on which it is based, are not subject to judicial review under the Administrative Procedure Act.

A. Judicial review is unavailable because the conduct of the census is "committed to agency discretion by law." 5 U.S.C. 701(a)(2). The Census Act provides that the Secretary shall conduct the census "in such form and content as he may determine." 13 U.S.C. 141(a). This language contains no standards against which to assess the Secretary's actions. Indeed, the language is at least as deferential as the statutory language found to bar review in *Webster* v. *Doe*, 486 U.S. 592 (1988). The broad statutory text mirrors the Census Clause of the Constitution, which provides for the census to be taken "in such Manner as they [the Congress] shall by Law direct." If Congress itself had mandated inclusion of federal personnel abroad based on home of record or comparable data, the Constitution would furnish no basis for a court to review that decision. The result should be no different here, where the Secretary made the same decision under an equally broad grant of authority. Moreover, the tradition since 1790 has been that the conduct of the census is committed to the Executive Branch, subject to oversight only by Congress. Practical considerations compel that conclusion as well, in light of (i) the myriad technical and policy judgments the census entails, (ii) the need to balance cost and feasibility, and (iii) the substantial disruptive consequences of allowing numerous and often competing judicial challenges to census results.

B. The relevant statutes also "preclude judicial review" under the APA. 5 U.S.C. 701(a)(1). The Census Act requires the Secretary to report state population totals to the President within nine months of the census date. 13 U.S.C. 141(b). The internal nature of that communication, from a cabinet member to the President, suggests no role for the courts, and the bare list of state populations scarcely furnishes a basis for judicial review of the vast census undertaking that produced those figures. Furthermore, the Secretary's report (which appellees challenge) has no operative effect; under the Apportionment Act, it is the President's statement to Congress that determines the number of Representatives to which each State is entitled. The President's statement is not a proper subject of judicial review under the APA, because the President is not an "agency" for APA purposes, and because Congress reserved to itself the role of reviewing and (if necessary) revising the apportionment based on the census. Judicial review also conflicts with the Apportionment Act's strict deadlines for the Secretary's report to the President, the President's statement to Congress, and the Clerk's certifications to the States, which are designed to assure the States a prompt opportunity to enact redistricting laws.

II. Even if judicial review is available, the district court erred in setting aside the Secretary's report of state population totals because federal personnel abroad were included based on their "homes of record" or comparable data. The district court itself properly rejected appellees' contentions that the Constitution and the Census Act permit counting only those people physically present on the census date, and therefore prohibit inclusion of federal military and civilian personnel serving their country abroad. The constitutional debates, the first census act, and the long history of census-taking since that time confirm that persons absent on the census date—even for an extended period—may properly be counted at their usual place of residence in the United States. Against that background, it was entirely appropriate for the Secretary to include overseas federal personnel in the 1990 decennial census—especially in light of the facts that such personnel vote and pay taxes, and are temporarily and (in the case of the military) involuntarily away from home in the service of their country.

Contrary to the district court's belief, it was not arbitrary and capricious for the Secretary to rely on service members' "homes of record" or comparable data as a basis for including them in the populations of the states. Even courts that have reviewed the Secretary's actions have

recognized that he has exceedingly wide latitude in selecting the *methods* for conducting the census. Here, the Census Bureau concluded that of the three available methods of allocation in existing Defense Department records, "home of record" best comported with the "usual residence" policy. The Census Bureau also found that the data to be furnished by the Defense Department were accurate for apportionment purposes. Finally, the Census Bureau found that the other available methods—legal residence or last duty station in the United States—were flawed by comparison.

III. In any event, the district court's extraordinary remedy—an injunction requiring new census tabulations and a reapportionment of the House of Representatives—was improper. Even in an ordinary APA case, the proper disposition is to remand to the agency for further consideration. The lower court's failure to follow that course here is particularly troublesome, because the relief it ordered both intrudes deeply into matters textually committed to the political Branches and disrupts time-sensitive redistricting by the States.

ARGUMENT

I. THE APPORTIONMENT OF REPRESENTATIVES, AND THE CENSUS ON WHICH IT IS BASED, ARE NOT SUBJECT TO JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT

The district court rejected appellees' contentions that inclusion of federal military and civilian personnel (and their dependents) abroad in the state population totals used for apportionment of Representatives violates the Constitution and the Census Act. J.S. App. 79a-81a & n.31. The court nevertheless invalidated the 1990 census totals for the States and the apportionment of Representatives based on those totals, finding that the *method* chosen by the Secretary to include overseas personnel in state population totals violated the Administrative Procedure Act.

The court had no authority to second-guess the details of the conduct of the census in this fashion, because appellees have no right to obtain judicial review of either (1) the report of state population totals by the Secretary of Commerce to the President pursuant to 13 U.S.C. 141(b), or (2) the apportionment of Representatives among the States made in the statement submitted by the President to Congress pursuant to 2 U.S.C. 2a. The apportionment of Representatives—and the census on which it is based—are matters of state that Congress has assigned to the Executive Branch, subject to review and (if necessary) revision only by Congress itself.

Congress has not chosen to involve the courts in that process. This conclusion is evident from the constitutional and statutory framework of the census, which expressly commits the conduct of the census and the apportionment of Representatives to the sound judgment and discretion of Congress and the Executive Branch and establishes deadlines that allow no room for judicial review. It also is evident from the very nature of an undertaking as vast and complex as the enumeration (and allocation among the States) of a national population that now totals more than 250 million people. The resulting census figures represent not only the sums of the persons counted, but also the sums of millions of individual decisions by approximately 200,000 enumerators and other Census Bureau personnel as well as the people being counted. Congress did not intend for the courts to review and set aside the census totals (much less the apportionment of Representatives) by entertaining challenges to the myriad separate judgment calls that must be made in assembling the data that produce those totals. In APA terms, this is a situation in which the challenged agency action is "committed to agency discretion by law" and in which the relevant "statutes preclude judicial review." 5 U.S.C. 701(a).

A. The Secretary's Compilation And Report To The President Of State Census Totals That Include Federal Personnel And Their Dependents Stationed Abroad Is "Committed To Agency Discretion By Law"

Agency action is committed to agency discretion by law where " 'statutes are drawn in such broad terms that in a given case there is no law to apply,' " *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945))—*i.e.*, " 'if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.' " *Webster* v. *Doe*, 486 U.S. 592, 600 (1988) (quoting *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985)). The Senate Report quoted in *Overton Park* further indicates that the agency discretion exception applies in other circumstances as well, since it refers to the situation in which there is "no law to apply" as an "example" of the category of cases covered by the exception. S. Rep. No. 752, *supra*, at 26. See *Webster*, 486 U.S. at 608 (Scalia, J., dissenting); *id.* at 605 (O'Connor, J., concurring in part and dissenting in part). Thus, the "APA did not significantly alter the 'common law' of judicial review of agency action" that had developed prior to its enactment. *Chaney*, 470 U.S. at 832.

Application of the exception requires consideration of the relevant statutory text and structure, *Webster*, 486 U.S. at 600-601; *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 455 (1979); whether the matter traditionally has been viewed as committed to agency discretion, *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282 (1987); *Chaney*, 470 U.S. at 831; whether the challenged action manifests a "general unsuitability" for judicial review because it involves a "complicated balancing of a number of factors," difficult judgments concerning the allocation of scarce administrative resources, or matters uniquely committed to another Branch, *Chaney*, 470 U.S. at 831-832; and whether judicial review would produce "disruptive practical consequences," *Seaboard Allied Milling*, 442 U.S. at 457. These factors compel the conclusion here that the Secretary's inclusion of federal personnel abroad in state population counts based on their homes of record or comparable data is—like the conduct of the census generally—committed to the discretion of the Secretary.

1. In the first place, the applicable statute, 13 U.S.C. 141(a), contains no standards against which to assess the Secretary's exercise of discretion. Far from confining the Secretary's discretion, the statute confirms it in the broadest possible terms: the census is to be conducted "in such form and content as he may determine." 13 U.S.C. 141(a). This plain language is at least as deferential as that at issue in *Webster*. That case involved a statute which, as the Court explained (486 U.S. at 600)

> allows termination of an Agency employee whenever the Director "shall *deem* such termination necessary or advisable in the interests of the United States" (emphasis added), not simply when the dismissal *is* necessary or advisable to those interests. This standard fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review.

The language of 13 U.S.C. 141(a) has a similar "deeming" element—the census is to be conducted as the Secretary "may determine." Moreover, the census statute, unlike the statute at issue in *Webster*, is entirely open-ended. While termination of employment in *Webster* was authorized whenever the Director deemed certain conditions to exist, the Secretary's discretion here is not even cabined to that extent. He is simply to "take a decennial census * * * in such form and content as he may determine."

As Judge Posner noted in the Seventh Circuit's recent decision in *Tucker* v. *United States Dep't of Commerce*, No. 91-2051 (Mar. 16, 1992), the census statute "say[s] nothing about *how* to conduct a census * * *. So nondirective [is] the relevant statute[] that it is arguable that there is no law for a court to apply in a case like

this." Slip op. 12 (emphasis added). Judge Ripple, concurring in the judgment, was more definitive: in his view, to the extent the plaintiffs sought to obtain judicial review of the Secretary's determination not to make a statistical adjustment of the census counts, "the plain language of the governing statute makes it clear that the matter is commited to agency discretion. There is 'no law to apply.'" Slip op. 16 (citation omitted).[7]

Although the district court agreed that 13 U.S.C. 141 (a) "is plainly drawn in discretionary terms" and that—standing alone—it "fairly exudes deference," J.S. App. 70a (quoting *Webster*, 486 U.S. at 600), it found that the statutory structure "has been refined further by the 'usual residence' policy that has governed census determinations since the First Census Act." J.S. App. 70a. The "usual residence" policy, however, does not provide law to apply in this case. The reason is that, like Congress itself in the first Census Act, the Secretary, in his discretion, has modified or departed from that policy from time to time throughout history—for example, with respect to seafarers in the 1870-1920 instructions; family members serving in the military overseas in the 1900 instructions; Americans abroad but not employed by the federal government in the instructions for 1910 through 1940; all military personnel abroad in the 1970 and 1990 censuses; boarding school students; college students from 1900-1940; certain merchant vessel crews currently; and Members of Congress. See pages 3-5 & n.1, *supra*. In short, the usual residence policy applies, except when—for a variety of reasons—it does not apply.

The question in this case is whether a court may review the Secretary's decision to modify or depart from that policy by including government personnel abroad (and their dependents) in state apportionment counts. The policy itself can provide no guidance in answering

[7] The *Tucker* majority rested its decision on a holding that the pertinent provisions did not authorize judicial review because they did not confer litigable rights. Slip. op. 11.

that question.[8] Holding the Secretary's exercise of discretion in modifying or departing *from* the usual residence policy to the litmus test *of* the usual residence policy makes no sense. The absence of any reference to the usual residence principle in the statutory text underscores that articulation and application of that principle, and the nature of the factual bases on which it may be invoked or modified in particular circumstances, are committed to the Secretary's discretion.

2. The constitutional basis for the census strongly reinforces the conclusion that its conduct is committed to agency discretion within the meaning of the APA. We do not contend that the conduct of the census presents a non-justiciable political question in the constitutional sense. Cf. *Montana*, slip op. 14-17. But the unbridled breadth of delegation of authority in the relevant constitutional and statutory texts nevertheless strongly suggests that the court below erred—and erred seriously—in invalidating the census totals and reapportioning the House of Representatives on the basis of its second-guessing of the Secretary's discretionary judgments.

Article I, Section 2, Clause 3 of the Constitution provides that the census shall be conducted "in such Manner as they [the Congress] shall by Law direct." By virtue of this language, "responsibility for conducting the decennial census rests with Congress." *Baldrige* v. *Shapiro*, 455 U.S. 345, 347-348 (1982). Nothing in the quoted text limits the "Manner" in which Congress may direct that the census be conducted. Certainly nothing in the constitutional text addresses the issue in this case: selection of appropriate criteria for allocating federal personnel abroad among the States. Indeed, as the district court pointed out, methods for counting various subclasses of people who may be away from what might be

[8] See *Arizona Power Auth.* v. *Morton*, 549 F.2d 1231, 1239 (9th Cir.) (Wallace, J.) ("In deciding whether agency action is committed to agency discretion by law, it is not significant that there may be law, in the abstract, that could possibly be applied. * * * Instead, we must determine whether in this particular case there is any specific law to apply."), cert. denied, 434 U.S. 835 (1977).

regarded as their domicile or legal residence on the census date "have reflected contemporary societal values" and the "administrative practicability and accuracy of making a count of a member of a subclass at a particular location" (J.S. App. 60a-61a n.24)—judgments that are beyond the expertise of a court to make. Accordingly, if Congress itself had "direct[ed]" that the "actual Enumeration" of federal personnel stationed overseas be made "in such Manner" as to include them in state populations based on their home of record or comparable data, the Constitution would furnish no basis for a court to review and set aside that legislative judgment.

There is no basis for a different result here simply because the determination was made by the Secretary of Commerce, rather than by Congress itself. Congress has directed the Secretary to take the decennial census "in such form and content as he may determine." 13 U.S.C. 141(a). As the district court itself correctly observed, this language "gives the Secretary broad discretion to determine how the census will be carried out, discretion which mirrors the broad mandate given to Congress" under Article I, Section 2, Clause 3. J.S. App. 81a n.31.

The Seventh Circuit, in *Tucker*, relied upon the broad language of Article I, Section 2, Clause 3—as well as that of the census and apportionment statutes implementing that Clause—in holding that those provisions do not authorize suits for judicial review of allegedly inaccurate census determinations. The court noted (slip op. 12):

> It might be different if the apportionment clause, the census statutes, or the Administrative Procedure Act contained guidelines for an accurate decennial census, for that would be some evidence that the framers of these various enactments had been trying to create a judicially administrable standard. There is nothing of that sort, and the inference is that these enactments do not create justiciable rights.

The claim in *Tucker* was that certain groups were undercounted in the 1990 census, but the court's reasoning from the textual materials applies with equal force in

the present context. Indeed, the *Tucker* court expressly noted its "doubts about the provenance and the practicability of the right enforced" in this case. *Id.* at 13.

3. The long history of decennial censuses and apportionments since the Constitution was ratified establishes a tradition of commitment of the conduct of the census to the discretion of the Secretary, subject to oversight only by Congress. Compare *Brotherhood of Locomotive Engineers*, 482 U.S. at 282; *Chaney*, 470 U.S. at 831. Indeed, it does not appear that any substantial judicial challenges to the census were brought until 1970, some 180 years after the first census act was passed—and 25 years after enactment of the APA.[9] There are three reported cases rejecting challenges to various aspects of the 1970 census—finding in each case that the particular action was rational or not arbitrary and capricious—but none discussed the applicability of the APA's exceptions to the general grant of judicial review.[10] In connection with the 1980 census, more than *fifty* cases were brought. In a number of those cases, the courts held that the conduct of the census is not committed to agency discretion within the meaning of the APA. J.S. App. 68a. However, in none of those cases did the court undertake a discerning analysis of the statutory text, constitutional backdrop, historical tradition, or the practical considerations (discussed at pages 24-27, *infra*) that weigh heavily against judicial review. Moreover, most of those decisions preceded this Court's decisions in *Chaney*, *Brotherhood of Locomotive Engineers*, and *Webster*, which underscored the relevance of these factors. And, finally, in none of

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[9] In *United States* v. *Steuart*, 47 F.2d 979 (D.C. Cir. 1931), the court affirmed a denial of mandamus relief to the City of Atlanta, which sought to compel the Census Bureau, in its official publications, to report the total population for metropolitan Atlanta as if it were a single city. The case, however, did not involve any challenge to the population totals themselves.

[10] See *Quon* v. *Stans*, 309 F. Supp. 604 (N.D. Cal. 1970); *West End Neighborhood Corp.* v. *Stans*, 312 F. Supp. 1066 (D.D.C. 1970); *Borough of Bethel Park* v. *Stans*, 319 F. Supp. 971 (W.D. Pa. 1970), aff'd, 449 F.2d 575 (3d Cir. 1971).

the cases challenging the 1980 census did the plaintiffs ultimately prevail. Thus, even in 1980, the census was, in the end, free of judicial alteration—as it historically has been.

4. Practical considerations also strongly support the conclusion that the conduct of the census is committed to agency discretion. Administration of the census requires myriad decisions about such matters as the feasible and most efficient ways of counting particular persons or categories of persons with an acceptable degree of accuracy (face-to-face interviews, telephone calls, questionnaires to be mailed back, contacts with neighbors, or use of existing records); the need for or feasibility of follow-up procedures and other quality control measures; which persons should be included in which households; and various issues concerning *where* a person should be enumerated, including how to account for people who are away from what might appear to be a usual residence in the United States—for a brief or extended period, and either inside or outside the United States.

Decisions to include or exclude certain categories of people at one location or another based on judgments about the accuracy of a count of a category pose particular policy dilemmas. The Secretary may in his discretion fix an acceptable error rate at a higher level in particular circumstances—depending on the feasibility of alternative methods of counting and the desirability of including the particular category in the apportionment counts. In making these judgments, cost is always a factor that needs to be weighed in the balance. Information that people may inhabit a remote Alaskan island in the Arctic Sea that is inaccessible to enumerators except at the cost of mounting a polar expedition may not justify efforts to find and count those people, even though Alaska might end up losing an additional Representative by one person. The census is conducted on a limited budget, and resources devoted to increasing the accuracy of the count of one particular category of persons are necessarily diverted from other enumeration tasks. Cf. *Mathews* v. *Eldridge*, 424 U.S. 319, 348-349 (1976).

Resolution of these and other issues requires a "complicated balancing of a number of factors" and renders the legislative-type fact-finding that is the census "general[ly] unsuitab[le]" for judicial review. *Chaney*, 470 U.S. at 831-832; see also *Panama Canal Co.* v. *Grace Lines, Inc.*, 356 U.S. 309, 317 (1958) (citation omitted) (matters committed to agency discretion because they are ones "on which experts disagree; they involve nice issues of judgment and choice"). As the district court observed in *City of Philadelphia* v. *Klutznick*, 503 F. Supp. 663, 676 (E.D. Pa. 1980), "[t]he accuracy of various statistics is often the focus of biased, heated and complex argument," and "[i]n the execution of the census, these disputes are best resolved not by the courts but by the Bureau itself, whose experience with prior censuses and expertise in the collection and analysis of statistical information render it especially qualified to make the appropriate decisions."[11] See *Tucker*, slip op. 12 (because relevant statutes are "nondirective," "you might as well turn [the undercount question] over to a panel of statisticians and political scientists and let them make the decision, for all that a court could do to add to its rationality or fairness").

Moreover, recognition of a right to judicial review under the APA would invite the courts to micromanage the census. It would also invite States and individuals who believe they have been shortchanged to sift through the census plan and its implementation to find just the right "defect"—namely, one whose "correction" would work to their advantage. The rash of suits following the past two censuses underscores that practical reality. Even if such suits ultimately fail, they will surely produce

[11] The *City of Philadelphia* court made these observations in support of its conclusion that, although the conduct of the census was not, in its view, unreviewable, a narrow standard of review was "particularly appropriate." 503 F. Supp. at 676. In our view, the observation quoted in the text (and that quoted below) support the conclusion that the census is entirely committed to agency discretion by law.

"disruptive practical consequences" for the Census Bureau. *Seaboard Allied Milling*, 442 U.S. at 457.

Failure to enforce the APA exception also would produce chaos, uncertainty, and competition among the States and their subdivisions and citizens resulting from politically or parochially driven lawsuits. As the *City of Philadelphia* court observed (503 F. Supp. at 677):

> [T]he Framers in their wisdom foresaw [that] the unique yet necessary and favored advantage of a federal census is the uniformity—nationwide—of its method; which, by avoiding the possibility of local bias, prevents the result from suffering the Nation's distrust. To allow local governments to gain control over the national census by applying to the courts for adjustment, recalculation, substitution and replacement of the Bureau's figures and techniques under the guise of judicial review is to sacrifice the national program to the exact dangers of local manipulation and bias, no matter how well intentioned, the Founders sought to avoid.

These considerations underscore the soundness of the conclusion that, at least in the absence of a violation of a constitutional limitation, cf. *Webster*, 486 U.S. at 603-604, the conduct of the census is committed to the discretion of a *single* agency (the Department of Commerce) having nationwide cognizance of the matter, without the intrusive and fragmenting involvement of numerous—and often competing—lawsuits reflecting a blatantly parochial perspective.

The district court, however, noted that "[t]he consequence of the census can be profoundly influential," and opined that "[i]t is especially appropriate to have some review by the courts, as the disinterested branch of government." J.S. App. 71a. Whatever their merits, such policy arguments cannot overcome Congress's determination that matters "committed to agency discretion by law" are *not* subject to judicial review under the APA, or Congress's determination in the Census Act to commit the form and manner of the census to the Secretary of Commerce. It is after all to Congress—however interested or disinterested—that the Constitution assigns responsibility for the census, and it may be precisely *because* "the consequence of the census can be profoundly influential" that Congress has not seen fit to provide a role for the judiciary in policing the conduct of the census. Instead, Congress has reserved to itself the responsibility for oversight of the Secretary's performance and correction of any perceived defects in the census and the resulting apportionment. See pages 31-32, *infra*. As the Seventh Circuit noted in *Tucker* (slip op. 4), "[i]t should go without saying that federal judges cannot provide a solvent for every social problem or a remedy for every questionable act of government," and nowhere is that more true than with respect to the technical and policy judgments surrounding a census of 250 million people.

B. The Census Act And Apportionment Act Preclude Judicial Review Of The State Population Totals Reported By The Secretary To The President And The Apportionment Of Representatives Made By The President's Statement To Congress

Congress's commitment of the conduct of the census to the discretion of the Secretary of Commerce is not the only obstacle to this suit. In addition, this is a case in which the relevant "statutes preclude judicial review." 5 U.S.C. 701(a)(1). Whether a particular statute precludes judicial review "is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 345 (1984); accord *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988); *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 131-133 (1987); see also *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 301 (1943) (the "type of problem involved and the history of the statute in question" are "highly relevant").[12]

[12] Under the APA, "[t]he presumption favoring judicial review of administrative action is just that—a presumption." *Community*

1. Under the APA, the only "final agency action" that could conceivably be subject to judicial review in the present context is the report that the Secretary of Commerce is required by 13 U.S.C. 141(b) to submit to the President within nine months of the census date (April 1).[13] The very nature of that report cuts strongly against the proposition that it is subject to judicial review. By statute, the report need only consist of "[t]he tabulation of total population by States * * * as required for the apportionment of Representatives in Congress among the several States," 13 U.S.C. 141(b), and the report submitted by the Secretary on December 26, 1990, in fact consisted (aside from a cover letter) only of that tabulation plus a calculation of the number of Representatives to which each State would be entitled under the method of equal proportions. A bare list of "total population by States" scarcely furnishes a basis for meaningful judicial review of those figures. There is, moreover, no suggestion in the Act that the Secretary's report must be based on or supported by particular findings, formal written decisions on various courses chosen, or an identifiable administrative record. In fact, the actual "record" of the census consists of the major part of the Census Bureau's activities over a period of several years around the census date and the countless documents and decisions those activities generate—scarcely a manageable basis for judicial review.[14]

Nutrition Institute, 467 U.S. at 341. And although the Court has observed that it may be overcome only upon a showing of "clear and convincing evidence," the Court has never applied that standard "in the strict evidentiary sense"; it is sufficient that "the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" *Id.* at 350-351 (quoting *Data Processing Serv.* v. *Camp*, 397 U.S. 150, 157 (1970)).

[13] See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 238-243 (1980); cf. *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177, 3190 (1990).

[14] It is because of this character of the census that there was no discrete administrative "proceeding," as such, concerning the particular subsidiary determination that appellees challenge—the inclusion of federal personnel abroad. Yet the district court both faulted the Secretary for not inserting in the "record" what it regarded as an adequate written explanation for those determinations and refused either to allow the Secretary to furnish a further explanation to the court or to remand the matter to the Secretary for that purpose. See J.S. App. 77a-79a, 87a-90a.

Finally, the Census Act provides that the tabulation shall be "reported by the Secretary to the President of the United States." 13 U.S.C. 141(b). It does not direct the Secretary to publish his report of the tabulations of state populations in the *Federal Register* or otherwise to the public at large; yet some formal publication would naturally be expected if Congress had intended to permit the tabulation to be judicially challenged. The internal nature of the communication, from a Member of the Cabinet to the President, suggests no basis for judicial involvement.

2. Under the governing statutory scheme, it is the action of the President, not the Secretary of Commerce, that determines the apportionment of Representatives. The Secretary's task is simply "to find the facts and then cease." *Switchmen's Union*, 320 U.S. at 305. The President, in turn, must transmit to Congress a statement showing the whole number of persons in each State and the number of Representatives to which it would be entitled under the method of equal proportions. 2 U.S.C. 2a(a). Subsection (b) of 2 U.S.C. 2a then provides that "[e]ach State shall be entitle[illegible] * to the number of Representatives shown in the [illegible]ement required by subsection (a)"—*i.e.*, the *President's* statement. The fact that the Act contemplates this additional (and operative) action by the President strongly implies that the Secretary's "report" is not a proper subject of judicial review under the APA. Cf. *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 110-114 (1948); *Reaves* v. *Ainsworth*, 219 U.S. 296, 306 (1911).

Nor is the President's statement to Congress a proper subject of judicial review under the APA. Indeed, as the D.C. Circuit held in *Armstrong* v. *Bush*, 924 F.2d 282 (1991), the President is not even an "agency" within the

meaning of the APA.[15] The D.C. Circuit correctly reasoned that 5 U.S.C. 701(b)(1) should not be read to apply to the Chief Executive's actions, in view of the textual silence, the legislative history of the APA, the "longstanding practice" of the Executive Branch in not subjecting the President's actions to the APA's procedures, and the "compelling reasons" for requiring a "clear statement" of congressional intent where a statute would implicate separation of powers concerns. 924 F.2d at 288-289; see also *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475 (1866).[16]

[15] Prior decisions had not reached the issue. See *Soucie* v. *David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971); *DeRieux* v. *Five Smiths, Inc.*, 499 F.2d 1321, 1332 (Temp. Emer. Ct. App.), cert. denied, 419 U.S. 896 (1974); *Johnsrud* v. *Carter*, 620 F.2d 29, 32 n.8 (3d Cir. 1980); *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 366 F. Supp. 51, 58 & n.14 (D.D.C. 1973); *Amalgamated Meat Cutters* v. *Connally*, 337 F. Supp. 737, 761 (D.D.C. 1971) (three-judge court).

[16] See also *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980). Furthermore, the functions of the President are separately addressed by Title 3 of the United States Code, not Title 5. The term "agency" would be a peculiar way to refer to the President in any event, since an "agency" is generally understood as being responsible to a principal. The President, of course, is not the agent of any principal, but rather is the principal—the constitutional officer in the Executive Branch to whom the agencies in that Branch are responsible.

Consistent with this view, the 1941 report of the Attorney General's Committee on Administrative Procedure distinguished the President's functions from those of the agencies to which the APA would be addressed: "Instead of being simply one means of continuous, integrated regulation, such as most of the regulatory bureaus and commissions undertake, [the President's functions] involve isolated or temporary authority to deal with emergency situations and often *the determination of high matters of State.*" *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 100 (1941) (emphasis added). The responsibility for submitting the apportionment statement to Congress was assigned to the President for these very reasons. The bill originally provided for the Secretary of Commerce to submit that report, but objections were raised that the Secretary "should not be intrusted with the final responsibility for making so important a report to Congress." S. Rep. No. 2, 71st Cong., 1st Sess. 5 (1929). The bill

Accordingly, the APA, and the presumption of judicial review it sets forth (see 5 U.S.C. 702, 704), do not support the relief sought by appellees and granted by the district court—namely an injunction requiring submission of a new apportionment statement to Congress pursuant to 2 U.S.C. 2a.

3. The fact that the operative action by the President takes the form of a statement addressed *to* Congress suggests that any defects that may be perceived in that statement (or the census data on which it is based) are to be addressed *by* Congress, not by members of the public or the courts in suits brought against Executive Branch officers after the statement has been transmitted. That is clear from the text of 2 U.S.C. 2a(b), which provides that "[e]ach State *shall be entitled*, * * * until the taking effect of a reapportionment under this section *or subsequent statute*, to the number of Representatives shown in the [President's] statement" (emphasis added). By expressly reserving to itself the power to alter the apportionment in a "subsequent statute," Congress foreclosed the courts from setting aside the "entitlement" conferred on a State by the President's statement.

The legislative history of the 1929 Act in which Congress enacted the automatic apportionment mechanism (albeit with a layover period for Congress to act, see Act of June 18, 1929, ch. 28, § 22(b), 46 Stat. 26-27) confirms that Congress intended to reserve to itself the power to correct any defects that might be perceived in the census and to enact a different apportionment if it believed such a course warranted.[17] Congress did just that in

accordingly was revised to substitute the President, "so that this function may be served by a constitutional officer." *Ibid.* This approach was also thought to "make[] for greater permanence, which is one of the major virtues to be desired in such a statute." *Ibid.*

[17] See 71 Cong. Rec. 1850 (1929) (Sen. Swanson) (complaining that the Act deprives Congress of the right to "investigate whether it was a fair or a fraudulent census" unless "Congress exercises its right within three months."); *ibid.* (Sen. Burton) (responding that three months had been sufficient time for "investigation for fraud or otherwise."); *id.* at 1324-1325 (Sen. Swanson) (inquiring how

1941, when it adopted the method of equal proportions in 2 U.S.C. 2a. Congress not only mandated use of the equal proportions method on a prospective basis (for the 1950 census apportionment and beyond); it also mandated its use "retroactively" to the 1940 census and required the Clerk to send new certificates of entitlement to the States —which benefited Arkansas at the expense of Michigan. See Act of Nov. 15, 1941, ch. 470, §§ 1, 2(a), 55 Stat. 762, 2 U.S.C. 2a, 2b; *Montana* Gov't Reply Br. 13.[18]

4. The time limits in the Census Act likewise foreclose any opportunity for judicial review. The Secretary must submit his report to the President within nine months of the census date (*i.e.*, by December 31), and the President then must transmit his statement to Congress during the first week of the next Session of Congress, which typically commences on January 3. 2 U.S.C. 2a(a). Within fifteen days, the Clerk of the House then must send to the Governor of each State a certificate of the number of Representatives to which it is entitled. The whole purpose of this expedited schedule is to ensure that state legislatures may rely on the apportionment made by the President's statement and promptly enact redistricting legislation.[19]

"the House can detect any possibility of fraud in ample time for investigation and ascertainment."); *id.* at 1332 (Sen. Black) (arguing that the Act deprives Congress of the "right to determine whether or not [the] census is honest and true."); *id.* at 1611 (Sen. Vandenberg) (responding that "Congress has [an] entire session in which to pass its own apportionment law on any basis it wants to"); *id.* at 1851, 1857.

[18] Similarly, bills have been introduced in the current Congress to revise the census (by making a statistical adjustment for a perceived undercount). See S. 28, H.R. 90, and H.R. 2316, 102d Cong., 1st Sess. (1991).

[19] If reapportionment were delayed by judicial review, the States might lose the opportunity to redistrict in a timely manner—a fact (as evidenced by the stay papers filed in this Court) that both Massachusetts and Washington have become acutely aware of in this case. As Representative McLeod, the author of the 1940 floor amendment that reduced the layover period in Congress to 60 days, explained (86 Cong. Rec. 4370 (1940)):

> Unless the States can be informed by Congress relatively early * * * as to just what representation they are to have for the next decade, the legislatures will be deprived of the opportunity to act on redistricting measures within the statutory limitations of their sessions * * *.
>
> If the reapportionment question is left open until Congress adjourns in June, July, or August, by that time the legislatures will have finished up their work and gone home * * *.

The period between receipt of the President's statement and the Clerk's sending of certificates of entitlement to the States was further compressed to 15 days by the Act of Nov. 15, 1941, ch. 470, § 2(b), 55 Stat. 762, thereby underscoring the statutory policy of immediately freeing the States to enact redistricting legislation. It is fundamentally incompatible with these statutory "objectives," *Community Nutrition Institute*, 467 U.S. at 345, for a court (or various courts in various cases) to review and set aside the apportionment made by the President's statement *after* the Clerk has informed the States of their entitlements. And the strict time limits preclude judicial review prior to that time. *Morris* v. *Gressette*, 432 U.S. 491, 504-505 (1977) ("Since judicial review * * * would unavoidably extend [statutory] period, it is necessarily precluded"); see also *Seaboard Allied Milling*, 442 U.S. at 457. "Such review would involve lengthy judicial proceedings in precisely the area where Congress was concerned that speed of resolution was necessary." *United Food & Commercial Workers Union*, 484 U.S. at 131-132.

II. INCLUDING FEDERAL PERSONNEL ABROAD AND THEIR DEPENDENTS IN STATE POPULATION TOTALS DID NOT RENDER THE SECRETARY'S REPORT OF THOSE POPULATIONS TO THE PRESIDENT ARBITRARY AND CAPRICIOUS

Even if the matters appellees challenge are not entirely committed to the Secretary's discretion or statutorily insulated from review, the district court plainly erred on the merits in setting aside the Secretary's report of state population totals because federal personnel abroad were included in those totals based on their "homes of record" or comparable data.

A. As an initial matter, the district court correctly rejected appellees' contention that it is *unconstitutional* to include federal military and civilian personnel stationed abroad in state population counts for apportionment purposes. See J.S. App. 79a-81a. Article I, Section 2, Clause 3 of the Constitution provides for apportionment of Representatives among the States according to their "respective Numbers"—*i.e.*, "Persons"—and for an "actual Enumeration" of those numbers every ten years. Nothing in this constitutional text suggests that military and civilian personnel abroad cannot properly be regarded, in the conduct of the census, as still part of the "respective Numbers" of the States from whence they came.

The constitutional debates support this construction of the text. The Framers repeatedly referred to the census as an enumeration of "inhabitants." See 1. M. Farrand, *The Record of the Federal Convention of 1787*, at 35, 486, 585 (1966); 2 *id.* at 130, 164, 178; *The Federalist*, No. 54 (J. Madison), at 371; *id.*, No. 55 (J. Madison), at 375; *id.*, No. 58 (J. Madison), at 391-392. The meaning attached to the phrase at the time is reflected in the substitution of the term "Inhabitant" for "Resident" in the Clause stating the qualifications of Members of the House of Representatives. See Art. I, § 2, Cl. 2. James Madison stated that "both ['resident' and 'inhabitant'] were vague, but the latter least so in common acceptation, and would not exclude persons *absent occasionally for a considerable time* on public or private business." 2 Farrand, *supra*, at 217 (emphasis added).[20]

[20] The practical construction of the term "Inhabitant" supports Madison's interpretation. In 1824, the House seated John Forsyth of Georgia, who at the time of his election was the United States' Minister to Spain. The Committee that recommended rejection of a challenge to his election observed: "The capacity in which he acted, excludes the idea that, by the performance of his duty abroad, he ceased to be an inhabitant of the United States; and, if so, inasmuch as he had no inhabitancy in any other part of the Union than Georgia, he must be considered as in the same situation as before the acceptance of the appointment." M. Clark & D. Hall, *Cases of Contested Elections in Congress* 497 (1834). Representative Bailey also pointed out that if the contrary proposition were accepted, sitting Members of the House would also be excluded from eligibility for election. *Ibid.*

The first Enumeration Act likewise used the word "inhabitant." Act of Mar. 1, 1790, ch. 2, § 5, 1 Stat. 103. And, using language echoing Madison's explanation of that word, the 1790 Act provided not only that every person would be counted at his "usual place of abode," but also that "every person occasionally absent at the time of the enumeration [shall be returned] as belonging to that place in which he usually resides in the United States." *Ibid.* The Act (like Madison's interpretation of the term "inhabitant") placed no limitation on the duration of the absence—which, considering modes of transportation in the late eighteenth century, was apt to be quite extended, particularly for persons overseas.[21] The language of the 1790 Act is unquestionably broad enough to encompass the present enumeration of federal military and civilian personnel stationed abroad, and this contemporaneous interpretation carries particular force in construing the pertinent constitutional language. *Bowsher* v. *Synar*, 478 U.S. 714, 723-724 (1986).

[21] At the time, the word "occasionally" did not necessarily mean "now and then" or "sometimes," as it now does. See *Webster's Third New International Dictionary* 1560 (1986). Dr. Johnson gave it the meaning "according to incidental exigence." 2 S. Johnson, *A Dictionary of the English Language* (1755) (Hildesheim Facs. ed. 1968). Accordingly, the fair implication is that the last-quoted phrase in the 1790 Act was intended to include persons who were away (even for a considerable time) for sufficient reason but with the intention of returning, and to exclude only those who had essentially abandoned the State in question and taken up permanent residence elsewhere in the United States or abroad. This conclusion is supported by the fact that Madison, who at the Constitutional Convention explained that the term "inhabitant" included those "absent occasionally" (even "for a considerable time"), was a member of the committee of the First Congress that drafted the Enumeration Act of 1790, which provided for inclusion of persons who were "occasionally absent." See T. Clemence, *Place of Abode* 8 (A.R. 169; J.A. 89).

Subsequent censuses were conducted under the same "occasionally absent" standard. Wright & Hunt, note 1, *supra*, at 925. Although the 1850 Act did not contain similar language, the instructions to Marshals for the conduct of the census that year stated that "[a]nyone who is temporarily absent on a journey, or for other purposes, without taking up his place of residence elsewhere, and with the intention of returning again, is to be considered a member of the family which the assistant marshal is enumerating." Bureau of the Census, *200 Years of U.S. Census Taking* 22 (1989). Similar instructions were followed for the 1860 census, *id.* at 24, and, ever since, categories of persons absent from their usual residence have nonetheless been counted at that place. See note 1, *supra*. This longstanding practice is entitled to great weight. *Dames & Moore* v. *Regan*, 453 U.S. 654, 686 (1981); *Smiley* v. *Holm*, 285 U.S. 355, 369 (1932).

In the court below, appellees relied on the language in Section 2 of the Fourteenth Amendment providing for apportionment of Representatives according to the number of persons "in each State." See J.S. App. 80a. But there is no indication that the Fourteenth Amendment was intended to overturn the settled practice of counting persons who were *not* physically present at their usual place of abode in the United States on the census date. Moreover, as the district court observed, the contrary interpretation appellees propose "finds no support in the case law," which instead interprets the "in each State" language to refer to actual inhabitants of the State—"that is, persons with some relation to the state," not "simply those who are physically in the state on census day." *Ibid.* In *Bethel Park*, the court found "no indication that the members of the Constitutional Convention had in mind any specific criteria by which persons were to be deemed residents of one state rather than another." 319 F. Supp. at 974. Consequently, "[a]llocation of what the *Bethel Park* court referred to as the 'fringe' populations has long been considered a discretionary decision open to revision as time unfolded and circumstances developed." J.S. App. 80a; see also *id.* at

81a (quoting 41 Op. Att'y Gen. 31, 33 (1949)). It is far too late in the Nation's history to suggest that enumeration of the population of the States must be based on a rigid rule of physical presence on the census date—a rule that has never been applied and that is especially out of place in an age of ever-increasing mobility.

B. The court likewise properly rejected appellees' contention that inclusion of federal personnel stationed abroad in state population totals violates the Census Act. J.S. App. 81a n.31. The Secretary of Commerce is directed by statute to conduct the decennial census "in such form and content as he may determine." 13 U.S.C. 141(a). This language "gives the Secretary broad discretion to determine how the census will be carried out, discretion which mirrors the broad mandate given to Congress" by Article I, Section 2, Clause 3 to provide for the enumeration "in such Manner as they shall by Law direct." J.S. App. 81a n.31. Because, as we have just explained, the Constitution itself poses no obstacle to the practice, the district court was clearly correct in concluding that "[t]he policy decision to apportion overseas federal employees [among the States] is well within the discretion afforded the Census Bureau under the Census Act." *Ibid.*

C. The district court was, however, clearly incorrect in holding that it nevertheless was arbitrary and capricious for the Secretary to use "home of record" (or comparable data) as the particular method for including federal personnel stationed abroad in the state apportionment for the 1990 census.

"The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). It follows that "a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute." *Id.* at 42. Insofar as factual issues are con-

cerned, the standard generally requires only that the agency "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* at 43 (quoting *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962)). In reviewing that explanation, a court must consider whether relevant factors were considered and whether there has been a "'clear error of judgment.'" *State Farm*, 463 U.S. at 43 (quoting *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974)).

This, however, is no ordinary case of judicial review of agency action. Even if the Court concludes (contrary to our submission in Point I) that the conduct of the census is not insulated from judicial review under the APA, any such review must be exceptionally deferential. The Secretary's construction of the Census Act itself is, of course, entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984). The Census Act, however, contains an exceedingly broad and open-ended delegation of authority to conduct the census in such "form and content" as the *Secretary* "may determine." 13 U.S.C. 141(a). Where, as here, the particular issue involved concerns a determination about the form and content of the census, the Secretary's judgments have "legislative" effect, and therefore are entitled to "more than mere deference." *Batterton* v. *Francis*, 432 U.S. 416, 424-426 (1977).

1. There can be no serious contention that the Secretary's decision in July 1989 to include federal personnel abroad in state apportionment counts (see A.R. 511-512; J.A. 120-122) was arbitrary and capricious. The district court properly concluded that the "flexibility of the 'usual residence' concept as applied by the Census Bureau over the years * * * demonstrates the broad discretion the Bureau has traditionally employed." J.S. App. 81a. In light of the past practice of including in the apportionment counts other categories of persons who are away from home on the census date, it plainly was rational for

the Secretary to treat those serving their country overseas in the same manner.

The reasons articulated by the Secretary fully support his decision, and surely manifest no "clear error of judgment." The Secretary first noted that the Defense Department "believes strongly that its employees should not be excluded from the apportionment counts because of temporary and involuntary residence overseas," and that "[m]any, if not most, of these military overseas consider themselves to be usual residents of the United States, even though they are temporarily assigned overseas." A.R. 511 (J.A. 120). The Secretary also relied on the precedent of including such personnel in the 1970 census, and the 1969 legal opinion of Assistant Attorney General Rehnquist that the Commerce Department enjoyed the discretion to do so. A.R. 512 (J.A. 121). That opinion in turn found it reasonable to assume that many persons living abroad vote in their home States and consider themselves to be represented in Congress by Members from their home States (A.R. 15 (J.A. 47))—factors that confirm the affinity that federal personnel stationed abroad retain for their home States.[22]

In addition, the Secretary considered the "growing bipartisan concern" of numerous Members of Congress that military and civilian personnel abroad should be counted. A.R. 511 (J.A. 120); see pages 7-8, *supra*. The House Report on the bill considered in 1988, for example, urged the equities of including such personnel in the census counts because they pay taxes, many of them vote, "they are stationed overseas in the course of service to their country," and excluding them from the census denies their "right to full and fair representation in Congress." H.R. Rep. No. 953, *supra*, at 3, 4; see generally 134 Cong. Rec. 25,798-25,804 (1988).[23] In a related vein, the Sec-

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[22] See also 42 U.S.C. 1973ff *et seq.* (guaranteeing right of uniformed service members and other persons overseas the right to vote in federal elections).

[23] The district court correctly rejected appellees' contention that it was somehow improper for the Secretary to consider such views

retary observed that inclusion of federal personnel abroad in apportionment counts would "avoid unnecessary debate," A.R. 511 (J.A. 120)—a desirable goal, both to facilitate final plans for the fast-approaching census, and to promote the public acceptability and absence of controversy that are necessary to a successful census. Finally, the Secretary pointed to the Defense Department's assurance that it was feasible to provide the necessary data on the usual residence of overseas military personnel and their dependents in time to meet the December 31, 1990 deadline for reporting to the President. A.R. 511-512 (J.A. 120-122).

2. The district court's objection was not to including federal personnel abroad as such, for it found nothing intrinsically irrational in that practice. Rather, the court objected to using home of record data for that purpose. Once again, the court was badly mistaken.

Given that the decision to include the federal personnel and dependents in the apportionment counts was manifestly reasonable, the Secretary's discretion is at its zenith in choosing an appropriate *method* of doing so and identifying the data on which to rely, with an eye to budgetary constraints and time limits. See *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 412 (1976). Accordingly, even

—in connection with both his 1989 decision to include overseas personnel and his 1990 decision to use home of record data for that purpose. J.S. App. 73a-75a. If the Secretary had undertaken an informal rulemaking proceeding on the question, he surely could consider (along with other comments received) what the court below characterized here as the "open, considered and reasoned expressions of individual and collective concern by members of Congress." *Id.* at 75a. Nor was there any violation of the principles of *INS* v. *Chadha*, 462 U.S. 919 (1983), in doing so. The views of Members of Congress that are not contained in a duly enacted law of course are not legally binding on the Executive Branch. But *Chadha* does not bar an official of the Executive Branch from taking such views into account where he deems them relevant. Cf. 462 U.S. at 955 n.19. Finally, the fact that the congressional support was "bipartisan" removes any suggestion of partisan advantage. Cf. *Montana*, slip op. 23-24.

lower courts holding that judicial review of census determinations is not completely barred have uniformly acknowledged the "wide latitude" afforded the Census Bureau "to select its methods, techniques and by those means to arrive at its own result." *City of Philadelphia*, 503 F. Supp. at 677 (quoted at J.S. App. 78a). In this case, the selection of home of record as the principal method of including federal personnel abroad clearly was, at the very least, not arbitrary and capricious. To the contrary, it was entirely reasonable.

a. Before the Secretary of Commerce decided in July 1989 to include federal personnel abroad in the apportionment counts, the Defense Department had independently decided to conduct a survey (with Census Bureau assistance) of military personnel stationed abroad. That survey was designed to elicit various information about such personnel and their families for Defense Department planning purposes and for the use of statisticians and others. See A.R. 433-458. Although the survey was not planned for apportionment purposes, when the Secretary of Commerce decided to include overseas military personnel in the decennial census, it was anticipated that the survey results could be used for apportionment purposes as well. A.R. 511 (J.A. 121).

Subsequently, however, the Defense Department dropped its plans to conduct its own survey or census of its personnel abroad, because of lack of funding and other constraints. Stip. ¶ 46 (J.A. 184); A.R. 787; see also note 4, *supra*. The Census Bureau then examined the three alternative approaches for including military personnel abroad based on data in existing Defense Department records: legal residence, last duty station in the United States, and home of record.[24] After doing so, the Secretary decided to utilize home of record—the same method

[24] The discussion in the text is confined to military personnel, because the vast majority of federal personnel included in the apportionment counts were members of the Armed Forces and their dependents. Stip. ¶¶ 54, 57 (J.A. 185-187).

that had been used for the 1970 census. The bases for doing so were entirely sound.

First, in view of all the currently available information, the technical staff of the Census Bureau concluded that "the Home of Record comes closest to the concept of the Usual Residence among the three data sources that DoD has available." A.R. 924 (J.A. 164). That judgment comported with the considered view of the House of Representatives, which passed a bill to mandate use of home of record data on the premise that it "most closely approximates the home State of individuals who are highly mobile, not by choice, but by virtue of their service to their country." H.R. Rep. No. 552, *supra*, at 3; accord J.A. 129 (quoted at page 9, *supra*) ("the state listed for home of record is the last location at which the members of the armed forces *CHOSE* TO RESIDE"). Moreover, home of record is the place to which the military will typically provide for the service member's return at the time of discharge, and it has the considerable virtue of "remain[ing] constant" in the face of the service member's often rapid mobility. J.A. 129.

The other methods were found to be significantly flawed by comparison. For example, when he recommended adoption of the home of record method, the Under Secretary explained that "because last duty station merely reflects the location of the facility to which a person is assigned, many military personnel and their dependents would be counted in states other than their actual previous U.S. residence (such as those assigned to the Pentagon, who would be counted as D.C. residents even though they lived in Maryland or Virginia)." A.R. 921 (J.A. 162-163). The last duty station also would often be a place to which the service member retains no affinity after being transferred.[25] And use of that method would "skew the census

[25] See A.R. 752 (remarks of Rep. Ridge during House subcommittee hearing on H.R. 2661, 101st Cong., 1st Sess. (1989), which would have required inclusion of overseas military personnel in apportionment counts) ("before I was shipped overseas I spent six months at Fort Benning, Georgia. I have not been since that time, at that time, or for the foreseeable future ever interested in being considered in any census as a resident of Fort Benning, Georgia. Northwestern Pennsylvania is my home.")

toward those few States with a large number of military bases" (134 Cong. Rec. 25,801 (1988) (Rep. Kennelly)) by including in those States' counts not only the substantial number of personnel stationed there, but also any who had left for an overseas tour. Similarly, the Under Secretary pointed out that a service member's legal residence —which is declared by a member of the Armed Forces for tax purposes (*CRS Study* 4 (A.R. 878; J.A. 149)) —does not necessarily reflect a substantial nexus to the State, especially since it may be chosen only because of its low tax rate. A.R. 921 (J.A. 162); see also A.R. 932 (J.A. 168) (a person may designate as his legal residence "a place where [he] was assigned at any point during military service, no matter how brief the assignment or how distant in time").[26]

Finally, the Under Secretary explained that the Defense Department had "agreed to use all automated records available to supplement [its] files in order to provide data of sufficient quality for apportionment purposes" and that Census Bureau staff would "work closely with DOD staff to assure the quality of those data." A.R. 921 (J.A. 162). The Under Secretary accordingly concluded that

[26] The Congressional Research Service had also studied the three available methods for allocating military personnel stationed abroad to particular States, and found that each has its advantages and disadvantages. Thus, it concluded that the home of record "may well reflect the person's own concept of his or her home State," although he or she may not return to that State at the end of the term of service; legal residence "reflects the State to which the person chooses to pay his or her taxes, but a person may choose a low or no tax State to claim as a legal residence"; and although last duty station may reflect where the person last resided and thus be comparable to the Census Bureau's usual residence rule, it may not actually indicate the State where a person lives because it "may be in a different State than where he or she resides." *CRS Study* 5-6 (A.R. 879-880; J.A. 151-152). The Secretary's choice among the three alternatives in these circumstances can scarcely be regarded as arbitrary and capricious.

"the complete 'home of record' data will constitute the most accurate data available from the Department of Defense." A.R. 919 (J.A. 158). In his letters to Members of Congress explaining the Department's decision (A.R. 925-942 (J.A. 165-168)), the Under Secretary pointed out that although approximately 7% of overseas personnel records lacked a home of record designation, the Defense Manpower Data Center planned to "use supplemental data from their automated records" to fill the gap and that, as a result, "the number of missing state designations will be negligible." See A.R. 931 (J.A. 167). Thus, the method by which the Secretary chose to include federal personnel abroad in state apportionment counts, like the decision to do so in the first place, was manifestly reasonable and was based on consideration of all relevant factors—in particular, the accuracy of all available data sources.

b. The district court did not address any of the foregoing factors supporting the Secretary's decision. Rather, as the district court saw it, the Secretary decided in July 1989 to incorporate overseas federal personnel in apportionment counts primarily because the Defense Department then planned to conduct a census of its personnel abroad concurrently with the general decennial census. The court correspondingly surmised that once the Defense Department withdrew its plans in December 1989, nothing but "inertial forces" drove appellants to use home of record data as a substitute for the Defense Department's cancelled survey, without regard to the accuracy of those data. J.S. App. 75a-76a. The court misunderstood the record and the basis for the Secretary's decisions.

The Secretary's July 1989 decision states that a "significant reason" for changing the Department's plans and counting federal personnel abroad was that the Defense Department had "just recently stated" that it was "feasible" to provide the necessary counts in time to meet the December 31, 1990, deadline for reporting to the President. A.R. 511 (J.A. 121). In other words, the "significant reason" was the expected *timing* of the information to be received from the Defense Department, not its particular character. Accordingly, the Under Secretary's recommendation, adopted by the Secretary, was only that overseas personnel be included provided that there was timely receipt of "acceptable data" from the Defense Department (A.R. 512; J.A. 122); the inclusion was not specifically conditioned on receipt of data from the planned survey.

The district court suggested that the Commerce Department did not take a fresh look at the accuracy of alternative data after the Defense Department cancelled its survey, and thus failed to answer the view previously expressed by a Defense Department witness at a congressional hearing that various sources of information in that Department's personnel records did not satisfy a "reasonable test of validity for apportionment purposes." J.S. App. 77a & n.29 (quoting A.R. 578). In fact, in recommending adoption of the home of record method, the Under Secretary quoted and responded directly to the Defense Department testimony that the district court cited, explaining that the Defense Department had since given assurances that its existing data "would be supplemented and improved by methodologies devised by technical experts who designed the overseas enumeration." A.R. 920 (J.A. 161).[27] Finally, although the district court made much of the Census Bureau's initial reliance on the Defense Department's proposed survey, which the court believed would have been preferable, that survey would have ascertained the person's last residence in the United States of six months or more in duration. A.R. 454, 497. Accordingly, like the last duty station method the Census Bureau considered and rejected, it would not necessarily have resulted in an accurate measure of a person's permanent affinity with the State in question.[28]

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[27] In any event, the views of the Defense Department, which is not responsible for the conduct of the census, are not entitled to substantial deference on what constitutes adequate data for that purpose.

[28] The district court also cited (J.S. App. 77a) the statement in the Census Bureau's 1987 plan for the 1990 census that assignment

Nor is there any basis for the district court's apparent view that an actual census of federal personnel was necessarily to be preferred to reliance on home of record in administrative records. See J.A. 106. The Census Act expressly authorizes the Secretary to rely on information furnished by other agencies, see 13 U.S.C. 6, and there was special reason to do so here. Unlike the problem in some other census situations, there is no question that the federal personel and dependents abroad actually exist; the only question is on what basis they will be assigned to particular States for apportionment purposes. Because the Secretary decided to rely on a measure that is contained in administrative records, those records were a fully adequate source, especially given considerations of feasibility that necessarily confronted the Census Bureau at the time. At least it was not arbitrary and capricious for the Secretary so to conclude. See *Bethel Park*, 319 F. Supp. at 979 ("There are presently a large number of members of the Armed Services abroad and the most feasible method of enumerating them as among the population of the United States is to count them back to the States wherein they were residents before entering the Armed Services."). The court below in fact acknowledged that "methods for dealing with the

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of military personnel abroad would be "arbitrary and operationally difficult." See J.A. 212. In context, however, this statement appears to have meant nothing more than that assignment would be "arbitrary" in the sense that any rule of general applicability (such as those involving seafarers, college students, etc.) may be so labeled. The district court was also mistaken in believing that home of record data might be inaccurate because a home of record might be designated for tax purposes. J.S. App. 76a-77a. Although the Census Bureau expressed the same view in 1976, based on a 1976 study of state taxation of military personnel (J.A. 55), the cited study does not address home of record; it instead discussed the selection of legal residence for tax purposes. See Advisory Commission on Intergovernmental Relations, *State Taxation of Military Income and Store Sales* 4-5, 24, 27-34 (1976); 50 U.S.C. App. 574. The Secretary in fact rejected general reliance on legal residence for apportionment purposes precisely for the reason mentioned in the 1976 study. See page 43, *supra*.

subclasses of persons" away from what might be considered their domicile or legal residence may properly take account of "the administrative practicability and accuracy of making a count of a member of the subclass at a particular location." J.S. App. 60a-61a n.24.

In any event, the question for a reviewing court is not which method of allocating personnel abroad (last duty station, home of record, legal residence) or which data base (actual survey or administrative records) is "best." That judgment is entrusted to the Secretary. The question is whether the Secretary failed to consider the relevant factors or made a clear error of judgment. *State Farm*, 463 U.S. at 43; cf. *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490, 527-529 (1980). The record confirms that the Secretary carefully considered the strengths and weaknesses of the various proposals and exercised sound judgment in making his choice.

Finally, even if the district court were correct that there were certain inaccuracies or anomalies in the home of record data for some (unspecified) percentage of the military personnel abroad, it does not follow that the *entire* population of such personnel should be excluded from the apportionment counts. The record shows that the apportionment of Representatives would not have been changed under any of the available alternative methods, and that, of the three, home of record was *most favorable* to Massachusetts. A.R. 887.[29]

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[29] The *CRS Study* also found that allocating military personnel among the States according to home of record is "closest to the population distribution of the entire population," whereas an allocation based on legal residence varies from the distribution of the entire population nearly three times as much as home of record and an allocation based on last duty station varies ten times as much. A.R. 880 (J.A. 153).

III. THE DISTRICT COURT'S REMEDY WAS, IN ANY EVENT, IMPROPER

Even if the district court were correct in holding that the Secretary did not adequately explain his determination, the relief it ordered was wholly improper. As this Court recently explained, the options of a reviewing court in such circumstances are narrowly confined:

> If the record before the agency does not support the agency action, if the agency has not considered all the relevant factors, or if the reviewing court simply cannot evaluate the challenged action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.

Florida Power & Light Co. v. *Lorion*, 470 U.S. 729, 744 (1985); accord *PBGC* v. *LTV Corp.*, 110 S.Ct. 2668, 2680 (1990); *Camp* v. *Pitts*, 411 U.S. 138, 142-143 (1973); *Overton Park*, 401 U.S. at 420. Adherence to that principle is especially necessary in the present context, because Congress has expressly conferred broad discretion and responsibility on the Secretary of Commerce to conduct the census, which necessarily includes authority to reevaluate data and methodologies when possible defects are brought to her attention. The district court improperly usurped that function by foreclosing any further consideration of including 919,810 persons in the state apportionment counts.

Furthermore, even if the court could, under ordinary APA principles, order the *Secretary* to delete overseas federal personnel and their dependents from the apportionment counts, it had no authority to enter an injunction requiring the *President* to effect a new apportionment of the House of Representatives by transmitting a revised statement to Congress pursuant to 2 U.S.C. 2a. As we have explained, the President is not even subject to suit under the APA. In any event, the APA does not override established principles governing the denial of

equitable relief. 5 U.S.C. 702. In particular, courts of equity "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982); see, *e.g.*, *Webster*, 486 U.S. at 604-605; *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944). Here, the public interest required denial of an injunction, because such relief constitutes an extraordinary intrusion into matters committed by the Constitution and laws to the political Branches, and effects an extraordinary disruption of the redistricting process that the expedited schedule in 2 U.S.C. 2a was designed to facilitate. See *Bethel Park*, 319 F. Supp. at 980 ("Even if plaintiffs had * * * prevailed, injunctive relief in their favor would be denied as detrimental to the public interest.").

CONCLUSION

The judgment of the district court should be reversed and the case remanded with instructions to enter judgment for the appellants.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 2, Clauses 1, 2 and 3 of the United States Constitution provide:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.
>
> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

2. Article I, Section 8, Clause 18 of the United States Constitution provides:

> SECTION 8. The Congress shall have Power
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> • • • • •
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> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

3. Sections 2 and 5 of the Fourteenth Amendment to the United States Constitution provide:

> SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.
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> • • • • •
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

4. 2 U.S.C. 2a provides:

> **Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk**
>
> (a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.
>
> (b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives; and in case of vacancies in the offices of both the Clerk and the Sergeant at Arms, or the absence or inability of both to act, such duty shall devolve upon the Doorkeeper of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed in the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

5. 13 U.S.C. 141(a) and (b) provide:

Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures

and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

* * * * *

6. 5 U.S.C. 701(a) provides:

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

7. 5 U.S.C. 706 provides:

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions of law found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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